

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY LEE RITCHIE,

Defendant-Appellant.

UNPUBLISHED

June 25, 1999

No. 208632

Presque Isle Circuit Court

LC No. 97-091617 FH

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of endeavoring to incite or procure perjury, MCL 750.425; MSA 28.667. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to 8 to 20 years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant pleaded guilty to a charge stemming from an insufficient funds check. He subsequently filed a motion to withdraw that plea. He attached an affidavit to the motion, which stated that he had signed a blank check, intending it to be a payroll check, and that his secretary mailed it to another person, to whom he was indebted, without his permission. To support his motion to withdraw his plea, he wanted to obtain an additional affidavit from the former secretary/bookkeeper, Robyn Robison. Robison testified that defendant wanted her to take responsibility for the check. She refused to do so. The charges in this case stem from defendant's attempts to procure the affidavit from Robison to attach to his motion to withdraw his plea.

I

Defendant first argues that the trial court abused its discretion when it admitted testimony about the prior withdrawn guilty plea on the insufficient funds check charge.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Generally, evidence of a prior withdrawn guilty plea is not admissible in any subsequent civil or criminal proceeding against the defendant who made the plea. MRE 410. However, here, the

trial court correctly concluded that the circumstances were outside the purview of MRE 410 because defendant's attempted subornation of perjury charge arose directly out of the circumstances surrounding his motion to withdraw his plea. See *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), where the Supreme Court stated:

Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime. [Citation omitted.]

See also *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996) (it is essential to give the jury an intelligible presentation of the full context in which disputed events took place) and *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983).

It was necessary to admit evidence that defendant withdrew his guilty plea in order to present the jury with the "complete story," *Delgado, supra*. In fact, the guilty plea evidence was directly related to and blended with the subornation of perjury charge because that charge was born out of the guilty plea. We cannot conclude that an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Defendant also argues that the jury should have been informed that the insufficient fund case had been dismissed four days prior to trial. He argues that the jury probably automatically assumed that since he had pleaded guilty, he must be guilty, and "despite the instructions to the contrary, was also guilty in this case". We disagree. The fact that the underlying insufficient funds case had been dismissed is irrelevant to the crime charged, and evidence must be relevant to be admissible. MRE 402. "The crime of endeavoring to incite perjury requires proof that the accused attempted to procure the perjurious testimony of another. It is necessary that the accused be aware that the testimony sought will be false." *People v Sesi*, 101 Mich App 256, 270; 300 NW2d 535 (1980). There must be proof of an overt act made in an attempt to obtain the perjurious testimony. *Id.* at 266. The prosecutor's theory was that defendant attempted to obtain a false affidavit from defendant to exculpate himself from a pending charge. At the time of the crime at issue in this case, the insufficient fund check charge was pending. Thus, the fact that the insufficient check charge was later dismissed has no bearing on the issue of whether, while the charge was pending, defendant attempted to obtain a false affidavit to exculpate himself. In addition, we note that unless defendant can demonstrate otherwise, which defendant here does not do, we presume that the jury followed their instructions. *McAlister, supra* at 504.

II

Defendant next argues that the trial court abused its discretion when it admitted the testimony of Kenneth Bills. Bills testified that, in a previous case, defendant solicited his false affidavit. Defendant argues that Bills' testimony was not admissible pursuant to MRE 404(b). We disagree.

The Supreme Court has articulated four requirements necessary to admit prior bad acts evidence:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Starr*, supra at 496, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

The testimony of Bills meets all four requirements. First, it was offered for a proper purpose, specifically to show a scheme or plan or absence of mistake. MRE 404(b)(1). Second, it was relevant.

Relevant evidence has two characteristics: it is "material" and has "probative force." MRE 401. To be "material," the evidence must be logically relevant to an issue or fact of consequence at trial. Any tendency to prove such a fact in issue constitutes sufficient probative value for purposes of relevancy. [*Starr*, supra at 497-498.]

Bills' testimony was logically relevant to an issue of consequence at trial, precisely whether defendant attempted to procure a false affidavit in this case. It also had probative force where it had a tendency to show that it was more probable that defendant had attempted to procure a false affidavit. Third, the evidence did not substantially outweigh the probative value. The third requirement necessitates that the evidence be balanced pursuant to MRE 403. *Id.* at 498. MRE 403 provides that relevant evidence should be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury and it would be inequitable to allow the proponent of the evidence to use it. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). Here, there has been no showing of unfair prejudice or that the probative value of the evidence was *substantially* outweighed by the risk that the jury would give the evidence undue or preemptive weight. In fact, there was sufficient evidence apart from Bills' testimony, to support defendant's conviction. Finally, the trial court gave a limiting instruction with regard to Bills' testimony. Thus, because the MRE 404(b) requirements have been met, we conclude that the trial court did not abuse its discretion in admitting the testimony and affidavit of Bills.

III

Defendant next argues that there was insufficient evidence presented at trial to support his conviction. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and any reasonable inferences taken from the evidence may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

As previously discussed, the crime of endeavoring to incite perjury requires proof that defendant attempted to procure the perjurious testimony of another and knew that the testimony he sought was

false. *Sesi, supra*. In this case, the primary evidence consisted of Robison's testimony, taped conversations between Robison and defendant, and Bills' testimony. There was sufficient evidence to prove that defendant engaged in "an overt act to implement the attempt" to incite or procure perjury. *Sesi, supra* at 266. Robison testified that defendant called her in July 1996, and asked her to call the prosecutor and tell him that she had been responsible for the overdrawn check. Robison further testified that defendant called her on several occasions in February 1997, asking her to make out an affidavit, stating that she was responsible for mailing out the insufficient fund check without defendant's permission. During at least one of those conversations, defendant offered her money for her affidavit. In the taped conversations, defendant either directly asked Robison to make out an affidavit or referred to his need for an affidavit to support his motion to withdraw his guilty plea. The evidence also demonstrated that defendant wanted the affidavit to contain false information. Robison testified that had she taken responsibility for the check, she would have done so falsely. She told defendant that it would be perjury. Moreover, it can be inferred, from the evidence that defendant offered to pay Robison for the affidavit, that defendant knew he was asking for false testimony and was willing to pay for it. See *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987) (intent may be inferred from all of the facts and circumstances). Viewing the evidence in the light most favorable to the prosecution, we conclude that the jury could have found that the elements of inciting or attempting to procure perjury were proved beyond a reasonable doubt. *Wolfe, supra*.

IV

Finally, defendant argues that his trial counsel was ineffective for two reasons. First, he claims that the trial court did not have subject matter jurisdiction over the case and that his attorney should have filed a motion to dismiss based on the lack of subject matter jurisdiction. Second, he argues that his counsel was ineffective for failing to object to the jury instructions and failing to have the court inform the jury that the underlying insufficient funds case was no longer pending. Because defendant did not move for a new trial or request an evidentiary hearing in this case, our review of defendant's ineffective assistance of counsel issue is limited to errors that are apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Upon review of the record, we do not find that defendant was denied ineffective assistance of counsel.

First, any motion by defense counsel to dismiss based on subject matter jurisdiction would have been meritless. Subject matter jurisdiction is the right of the court to exercise jurisdiction over a class of cases, such as criminal cases. *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998). In Michigan, the circuit courts have jurisdiction over felony charges. MCL 600.601; MSA 27A.601; *People v Loukas*, 104 Mich App 204; 304 NW2d 532 (1981); *People v West*, 54 Mich App 527, 530; 221 NW2d 179 (1974). Since endeavoring to incite perjury is a felony, MCL 750.425; MSA 28.667, it is in a class of cases over which the circuit court has subject matter jurisdiction. *Goecke, supra* at 458. A motion to dismiss for lack of subject matter jurisdiction would therefore have been futile. "Defense counsel is not required to make frivolous or meritless motions." *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Thus, defendant was not denied effective assistance of counsel where no motion to dismiss for lack of subject matter jurisdiction was made. In making our ruling, we note that defendant has completely failed to support his argument that "since the original

underlying case [the insufficient funds case] was dismissed, the lower court lacked jurisdiction over the subject matter of this case.” And, we note that this argument is nonsensical. The circuit court did not lose subject matter jurisdiction over one felony simply because another felony was dismissed.

Second, defendant argues that counsel was ineffective for failing to object to the jury instructions. He argues that the jury should have been informed that the underlying case had been dismissed. We disagree.

Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Jury instructions must be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant’s rights. [*People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997) (citations omitted).]

In this case, the jury was informed that defendant was charged with attempted subornation of perjury, specifically “the alleged attempt to persuade Robyn Robison to file a false affidavit in a criminal case that was pending in this County against the Defendant for insufficient -- writing insufficient funds check.” This instruction was not error. The criminal case stemming from the insufficient funds check was pending when defendant attempted to persuade Robison to file her false affidavit. Although the jury was not instructed that the charge had subsequently been dismissed prior to trial, that information was entirely irrelevant to the issue before the jury, as was previously discussed above. It would have been frivolous for defense counsel to object to the jury instructions on the ground that the jury was not informed about an irrelevant fact.

Defendant has completely failed to demonstrate that counsel’s performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy